

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

August 11, 2004 Session

RICKY DALE TWEED, ET AL. v. JOHN A. KISER, ET AL.

**Appeal from the Circuit Court for Washington County
No. 8356 Thomas J. Seeley, Jr., Judge**

No. E2003-02923-COA-R3-CV - FILED OCTOBER 19, 2004

Ricky and Patricia Tweed ("Plaintiffs") agreed to purchase a house owned by John and Betty Kiser ("Defendants") for \$145,000. Defendants owned another house in which they lived and, in a separate agreement, Plaintiff Ricky Tweed ("Tweed") agreed to build a sunroom and garage onto that house. Tweed and Defendants agreed that the cost of Tweed's labor would be equivalent to the cost of the materials which were estimated to be \$21,000, and that Tweed would be paid for his labor by deducting the total labor cost from the purchase price of the house that he and his wife were buying. After various disputes arose, Plaintiffs sued seeking specific performance of the contracts. One of the issues at trial was whether Tweed's claim for compensation was limited by the Contractors Licensing Act of 1994 because he was an unlicensed contractor. The Trial Court concluded Tweed's compensation should be determined based on quantum meruit, and in so doing concluded Plaintiffs were entitled to a credit against the purchase price of the house in the amount of \$21,806.62. In accordance with the Contractors Licensing Act of 1994, we conclude Tweed's claim for compensation is limited to his actual documented expenses proven by clear and convincing evidence. Therefore, the Trial Court erred when it concluded Tweed's compensation for building the sunroom and garage should be determined by quantum meruit.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit
Court Affirmed in Part and Vacated in Part; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

James D. Culp, Johnson City, Tennessee, for the Appellants John A. Kiser and Betty Downs Kiser.

Bob McD. Green, Johnson City, Tennessee, for the Appellees Ricky Dale Tweed and Patricia Ann Tweed.

OPINION

Background

Defendants own a house located on Old Stage Coach Road in Jonesborough, Tennessee. Plaintiffs entered into a “Land Contract” with Defendants and agreed to purchase this house for \$145,000. Plaintiffs, however, had not sold their then current house and apparently intended to use some or all of their equity from that sale toward the purchase of Defendants’ house. Plaintiffs nevertheless moved into Defendants’ house and the parties agreed that until Plaintiffs sold their house, they would pay monthly rent of \$1,100 for February and March of 2001. Beginning in April of 2001, the rent would continue at \$1,100 per month, but 75% of the rent would be applied toward the purchase price. Plaintiffs also agreed to pay the property taxes and to maintain insurance on the house.

Defendants lived in a different house located on John West Road and wanted to add a sunroom and garage to that house. Plaintiff Ricky Tweed and Defendants entered into a second written agreement wherein Tweed agreed to build the sunroom and garage. Defendants agreed to supply all of the materials for the construction at an estimated cost of approximately \$21,000. It was further agreed that the cost of the labor on this project would match the cost of the materials, and the cost of Tweed’s labor would “go towards the principle (sic) on purchase of [the] house” located on Old Stage Coach Road.

Tweed filed this lawsuit claiming that he had substantially completed the sunroom and garage, but that his completion of the project was impeded when Defendants began writing checks which were returned for insufficient funds, thereby forcing Tweed to purchase some of the materials using his own funds. Tweed also claimed to have performed additional work for Defendants over and above that called for in the agreement and for which he had not been compensated. Tweed further claimed to have made approximately \$15,000 in improvements to the house since moving into it. Tweed requested the Trial Court to order Defendants to specifically perform the contracts as agreed. Tweed further claimed that the cost of the materials for the sunroom and garage totaled \$20,522.61 to date, and that he was entitled to an off-set against the purchase price of the house in that same amount as compensation for his labor.

Defendants filed an answer and a counterclaim.¹ Defendants claimed they had given Tweed blank checks to buy materials along with specific instructions on the maximum amount that could be used. Because Tweed wrote checks exceeding this “maximum amount,” they were returned for insufficient funds. Defendants further claimed that the work performed by Tweed on the sunroom and garage was not performed in a workmanlike manner, “or even performed to minimally acceptable standards.” Defendants claimed Tweed’s poor work resulted in the roof having several

¹ Patricia Tweed was not a plaintiff when this lawsuit originally was filed. She became a party to this litigation when Defendants filed a third-party complaint against her at the same time they filed their answer and counterclaim. For ease of reference, we collectively refer to Ricky and Patricia Tweed as “Plaintiffs.”

significant leaks which required the roof to be replaced. Defendants also alleged they had to replace the electrical work performed by Tweed at a cost of \$1,400. Finally, Defendants claimed that Plaintiffs, after moving into the house, engaged in various activities which resulted in the value of the house being diminished in an amount which could exceed \$50,000. Defendants requested the Trial Court order Plaintiffs to vacate the premises and that Defendants be awarded monetary damages.

One of the main issues at trial was whether Tweed's claim for compensation for building the sunroom and garage was limited by statute because he was an unlicensed contractor pursuant to the Contractors Licensing Act of 1994, Tenn. Code Ann. § 62-6-101 *et seq.* That Act defines a "contractor" as follows:

"Contractor" means any person or entity who undertakes to, attempts to, or submits a price or bid or offers to construct, supervise, superintend, oversee, schedule, direct, or in any manner assume charge of the construction, alteration, repair, improvement, movement, demolition, putting up, tearing down, or furnishing labor to install material or equipment for any building, highway, road, railroad, sewer, grading, excavation, pipeline, public utility structure, project development, housing, housing development, improvement, or any other construction undertaking for which the total cost of the same is twenty-five thousand dollars (\$25,000) or more. "Contractor" includes, but is not limited to, a prime contractor, electrical contractor, electrical subcontractor, mechanical contractor, mechanical subcontractor, plumbing contractor, and plumbing subcontractor. If the cost of a project exceeds twenty-five thousand dollars (\$25,000), "contractor" also includes a construction manager of any kind, including, but not limited to, a residential construction manager, construction consultant, architect, and/or engineer who conducts or provides any activity or service described herein other than normal architectural or engineering services

Tenn. Code Ann. § 62-6-102(3)(A).

If Tweed was a "contractor" pursuant to Tenn. Code Ann. 62-6-102(3)(A), but was unlicensed, then his claim for damages would be limited by Tenn. Code Ann. § 62-6-103. With certain exceptions not applicable here and as relevant to this appeal, Tenn. Code Ann. § 62-6-103 provides as follows:

(a)(1) Any person, firm or corporation engaged in contracting in this state shall be required to submit evidence of qualification to engage in contracting, and shall be licensed as hereinafter provided. It is unlawful for any person, firm or corporation to engage in or offer

to engage in contracting in the state, unless such person, firm or corporation has been duly licensed under the provisions of this chapter, as hereinafter provided. Any person, firm or corporation engaged in contracting, including such person, firm or corporation that engages in the construction of residences or dwellings constructed on private property for the purpose of resale, lease, rent or any other similar purpose, shall be required to submit evidence of qualification to engage in contracting, and shall be licensed. It is unlawful for any person, firm, or corporation to engage in, or offer to engage in, contracting as hereinabove described, unless such person, firm or corporation has been duly licensed under the provisions of this chapter.

* * * *

(b) Any unlicensed contractor covered by the provisions of this chapter shall be permitted in a court of equity to recover actual documented expenses only upon a showing of clear and convincing proof.

When the trial was completed, the Trial Court concluded that Plaintiffs had made twenty-nine (29) payments of \$1,100 since April of 2001. Pursuant to the terms of the Land Contract, Plaintiffs were entitled to a credit against the purchase price of the house in an amount equal to 75% of these payments, or a total of \$23,925. The Trial Court also concluded that the cost of the materials for the sunroom and garage totaled \$21,806.62, and that Plaintiffs were entitled to an off-set against the purchase price in that same amount. According to the Trial Court:

My understanding of the law is when someone who is not a licensed contractor constructs something in excess of \$25,000.00 or more, he's entitled to recover under the theory of quantum meruit, not just for his documented expenses. And in this contract, it seems to me the parties have basically said the quantum meruit is equal to the cost of the materials.

The Trial Court then subtracted the two off-sets of \$23,925.00 and \$21,806.62 from the total purchase price of \$145,000 for the house, leaving a balance of \$99,268.38. The Trial Court then determined that Defendants were entitled to recover a total of \$13,496 for expenses they incurred in repairing the sunroom and garage. The Trial Court added the \$13,496 to the balance of \$99,268.38, resulting in Plaintiffs owing a total of \$112,764.38 on the purchase of the house. The Trial Court entered a judgment ordering Plaintiffs to pay a total of \$112,764.38 within sixty days if they still desired to purchase the house. Otherwise, Plaintiffs were to vacate the property within sixty days.

Defendants appeal claiming the Trial Court erred when it applied quantum meruit and concluded Plaintiffs were entitled to the off-set of \$21,806.82 against the purchase price of the house. According to Defendants, because Tweed was an unlicensed contractor, pursuant to Tenn. Code Ann. § 62-6-103(b), the most he could recover would be his actual documented expenses proven by clear and convincing evidence.

Discussion

The factual findings of the Trial Court are accorded a presumption of correctness, and we will not overturn those factual findings unless the evidence preponderates against them. *See* Tenn. R. App. P. 13(d); *Bogan v. Bogan*, 60 S.W.3d 721, 727 (Tenn. 2001). With respect to legal issues, our review is conducted “under a pure *de novo* standard of review, according no deference to the conclusions of law made by the lower courts.” *Southern Constructors, Inc. v. Loudon County Bd. Of Educ.*, 58 S.W.3d 706, 710 (Tenn. 2001).

In their briefs on appeal, the parties concede the following: (1) the contract price for the sunroom and garage had an estimated cost of \$21,000 for materials and an equivalent amount for labor, the total of which exceeded \$25,000; and (2) Tweed was “not a licensed contractor.” Furthermore, at oral argument Tweed’s counsel conceded that because the contract price exceeded \$25,000 and because Tweed was “not a licensed contractor,” the Trial Court erred when it applied quantum meruit to determine Tweed’s compensation for constructing the sunroom and garage. This concession is in accord with our decision in *Roberts v. Houston*, 970 S.W.2d 488 (Tenn. Ct. App. 1997) where we held that the plaintiff’s evidence established “a contract which was illegal under the provisions of the ‘Contractor’s Licensing Act of 1994’.” Moreover, as a general rule, where a cause of action is based upon an illegal contract, recovery cannot be had on a quantum merit.” *Id.* at 490 (citing *Hotel v. Ewing*, 124 Tenn. 536, 138 S.W. 954 (Tenn. 1911)); *Cf. Kyle v. Williams*, 98 S.W.3d 661, 665 (Tenn. 2003). More importantly, the language of the statute as written by our Legislature is clear in providing that an unlicensed contractor covered by this statute may recover only his “actual documented expenses only upon a showing of clear and convincing proof.”

Since the parties agree that the Trial Court erred when it applied quantum meruit to determine the amount of Tweed’s claimed damages, we vacate the portion of the Trial Court’s judgment which awarded Tweed a credit against the purchase price of the house in an amount of \$21,806.62. Because the credit to Tweed of \$21,806.62 formed an integral part of the Trial Court’s ultimate conclusion that Plaintiffs could purchase the house for a total of \$112,764.38, we also must vacate that final holding as well. We note that the parties disagree as to what constitutes “actual documented expenses” for purposes of Tenn. Code Ann. § 62-6-103(b). Plaintiffs ask this Court to determine whether some of the specific expenses claimed by Tweed should be considered actual documented expenses on remand to the Trial Court. Plaintiffs further request this Court to advise whether any actual documented expenses proven by clear and convincing evidence should be off-set against the \$13,496 in damages incurred by Defendants in repairing the work on the sunroom and garage, or whether it should be off-set against the purchase price of the house. We believe all these

issues should be decided initially by the Trial Court, and we decline Plaintiffs' invitation to render an advisory opinion on these matters.

The portion of the Trial Court's judgment awarding Plaintiffs a credit in the amount of \$21,806.62 against the purchase price of the house is vacated, as is the Trial Court's holding that Plaintiffs can purchase the house for a grand total of \$112,764.38. We remand this case for further proceedings as required, if any, in order for the Trial Court to determine the amount of Tweed's actual documented expenses proven by clear and convincing evidence. In all other respects, the judgment of the Trial Court is affirmed.

Conclusion

The judgment of the Trial Court is affirmed in part and vacated in part, and this cause is remanded to the Trial Court for further proceedings as may be required, if any, consistent with this Opinion and for collection of the costs below. Costs on appeal are assessed against the Appellees Ricky Dale Tweed and Patricia Ann Tweed.

D. MICHAEL SWINEY, JUDGE